

1 RICHARD DeNATALE (Bar No. 121416)
2 CELIA M. JACKSON (Bar No. 124508)
3 Heller Ehrman LLP
4 333 Bush Street
5 San Francisco, CA 94104-2878
6 Telephone: (415) 772-6000
7 Facsimile: (415) 772-6268
8 Email: richard.denatale@hellerehrman.com
9 Email: celia.jackson@hellerehrman.com

10 Attorneys for Plaintiffs

11 LENSCRAFTERS, INC., EYEXAM OF
12 CALIFORNIA, INC., and EYEMED VISION CARE, LLC

13 IN THE UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 LENSCRAFTERS, INC.; EYEXAM OF
16 CALIFORNIA, INC.; and EYEMED VISION
17 CARE, LLC,

18 Plaintiffs,

19 v.

20 LIBERTY MUTUAL FIRE INSURANCE
21 COMPANY and EXECUTIVE RISK SPECIALTY
22 INSURANCE COMPANY,

23 Defendants,

24 AND RELATED COUNTER- AND CROSS-
25 CLAIMS.

26 Case No.: CV-04-01001 SBA

27 **PLAINTIFFS' REPLY
28 MEMORANDUM IN SUPPORT OF
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED**

29 **[LOCAL RULE 3-12(b)]**

1 Plaintiffs respectfully request that the Court consider this brief reply memorandum in
 2 support of their administrative motion to deem Case No. C-07-2853 EMC, filed by LensCrafters,
 3 Inc. and EYEXAM of California, Inc. on May 31, 2007 (the “Second LensCrafters Action”), a
 4 “related case,” within the meaning of Local Rule 3-12(a). We recognize that the Local Rules do not
 5 appear to contemplate the filing of a reply in most circumstances, but in this instance defendant
 6 United States Fire Insurance Company (“U.S. Fire”) — the only defendant opposing plaintiffs’
 7 motion — has filed an opposition that contains several misstatements of fact. Plaintiffs believe that
 8 these facts should be corrected now, so that the Court can make its determination whether the cases
 9 are related based on an accurate and complete record.

10 First, U.S. Fire claims that plaintiffs have tried to make the first and second coverage cases
 11 in this Court appear more related than they are by intentionally and improperly omitting from the
 12 coverage suit five LensCrafters-related entities that U.S. Fire claims are defendants in the
 13 underlying *Snow* litigation. U.S. Fire’s assertion that there should be 12 parties in the Second
 14 LensCrafters’ Action — which is made to suggest that there is less overlap of the parties to both
 15 actions than there really is — is simply wrong. In fact, the five other LensCrafters-related entities
 16 were dismissed as defendants in *Snow* and therefore have no claims for indemnity arising out of the
 17 *Snow* action. EyeMed Vision Care, LLC — which was named as a plaintiff in this action, but not in
 18 the Second LensCrafters Action — has also been dismissed from *Snow*. Thus, the Second
 19 LensCrafters Action properly names as plaintiffs only those entities who have a dispute with U.S.
 20 Fire and the other defendants regarding claims for indemnity in *Snow*, and every plaintiff in the
 21 Second LensCrafters Action was a plaintiff in the First LensCrafters Action.

22 Second, U.S. Fire argues that this action and the Second LensCrafters Action do not arise
 23 from the same transaction or events. In fact, both actions arise from the underlying *Snow* action
 24 and the events that led to its filing — that is, the business model used by LensCrafters in
 25 California, and the transactions between LensCrafters and the purported class members that
 26 allegedly violated California’s medical privacy statute. Simply because there is a different legal
 27 standard for the duty to defend than for the duty to indemnify does not mean that the actions arise
 28 from different transactions. Moreover, at least one of the summary judgment motions decided by

1 this Court in the First LensCrafters Action directly relates to the duty to indemnify issues that will
 2 arise in the second action. In the Court's October 5, 2005 Order (Ex. 3 to the Jackson Dec.), the
 3 Court found that the ERSIC policy was excess to the Liberty policy, and therefore ERSIC did not
 4 have a duty to defend. This ruling implicates the order of exhaustion of policies for purposes of
 5 indemnity. Thus, it would be a duplication of judicial effort to have a different judge consider this
 6 same issue, just as it would be a duplication of judicial effort for a different judge to analyze the
 7 same policies and insurance coverage law that this Court has already analyzed.

8 Finally, U.S. Fire claims that the First LensCrafters Action involved only two of the 17
 9 relevant insurance policies. Opp. at 4:5-7. In fact, this action involved seven insurance policies,
 10 not two — six issued by Liberty Mutual Fire Insurance Company and one issued by ERSIC. All of
 11 these policies are also at issue in the Second LensCrafters Action. While the Second LensCrafters
 12 Action includes a number of additional policies, all of them are excess policies that contain insuring
 13 agreements and other provisions that are largely identical to the language in the Liberty Mutual
 14 policies that the Court examined in detail and interpreted in its January 20, 2005 summary
 15 judgment Order.

16 Finally, as U.S. Fire states in its opposition, it has filed a declaratory relief action in the
 17 State of New York against plaintiffs regarding the duty to indemnify for the *Snow* action. Plaintiffs
 18 believe that New York is an inappropriate forum, and plan to litigate that issue at the appropriate
 19 time.

20 DATED: June 14, 2007

Respectfully submitted,

21 HELLER EHRLMAN LLP

23 By /s/ Celia M. Jackson
 24 Celia M. Jackson

25 Attorneys for Plaintiffs
 26 LENSCRAFTERS, INC., EYEXAM OF CALIFORNIA,
 27 INC., AND EYEMED VISION CARE, LLC

28

PROOF OF SERVICE

I, Michael Ewers, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 333 Bush Street, San Francisco, California 94104-2878.

On June 14, 2007, I served the following document(s):

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF
ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES
SHOULD BE RELATED AND REQUEST FOR LEAVE TO FILE SAME**

on the interested parties in this action by placing true and correct copies thereof, enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

- [] **BY MAIL:** I am readily familiar with the business' practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.
- [X] **BY FACSIMILE TRANSMISSION:** I transmitted such documents by facsimile as indicated on the attached service list.
- [X] **BY HAND DELIVERY:** I caused the document(s) to be delivered by hand as indicated on the attached service list.
- [X] **BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered to the above parties on the following business day by FEDERAL EXPRESS service as indicated on the attached service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that this declaration is executed on June 14, 2007, at San Francisco, California; and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

/s/ Michael Ewers

Michael Ewers

SERVICE LIST

Alex F. Stuart, Esq.
Willoughby, Stuart & Bening
Fairmont Plaza
50 West San Fernando, Suite 400
San Jose, CA 95113
*Anticipated Counsel for Liberty Mutual
Fire Insurance Co.*
Via Facsimile and Federal Express

Terrence R. McInnis, Esq.
Ross, Dixon & Bell, LLP
5 Park Plaza, Suite 1200
Irvine, CA 92614
*Anticipated Counsel for Executive Risk
Specialty Insurance Co.*
Via Facsimile and Federal Express

Amy E. Rose, Esq.
Squire, Sanders & Dempsey L.L.P.
One Maritime Plaza, Suite 300
San Francisco, CA 94111-3492
*Anticipated Counsel for United States
Fire Insurance Co.*
Via Hand Delivery

Robert D. Dennison, Esq.
Harris, Green & Dennison
5959 W. Century Blvd., Suite 1100
Los Angeles, CA 90045
*Anticipated Counsel for Westchester
Fire Insurance Co.*
Via Facsimile and Federal Express

Irene Yesowitch, Esq.
Chip Cox, Esq.
Long & Levit LLP
465 California Street, 5th Floor
San Francisco, CA 94104
*Anticipated Counsel for Markel
American Insurance Co.*
Via Hand Delivery